

## **EXHIBIT D**

Transcript April 7 2006.txt

12 THE COURT: Without getting into the blame game, if,  
13 for example, the \$1 million is all he has, for example, to pay  
14 for his defense and that when the bail was set it could be  
15 argued that people didn't anticipate in good faith that there  
16 would be such a delay between indictment and when the trial  
17 would actually take place, why isn't that enough?

18 MS. McEVOY: Because it is not relevant to the issue  
19 of whether he poses a risk of appearance.

20 THE COURT: Then why wouldn't the other argument that  
21 Mr. Colton makes, his compliance with the conditions thus far?  
22 At the beginning stage, it is one thing; it is a bit of a leap  
23 of faith. On the other hand, there is a bit of a track record,  
24 Mr. Colton would say almost a year's worth of a track record.

25 MS. McEVOY: I think the case law and certainly the  
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1 act itself contemplates a changed circumstance with respect to  
2 his risk of appearance to be necessary in order for the  
3 conditions to be changed. I don't think that has been  
4 presented here.

5 The administration of justice taking longer because of  
6 various motions and privilege issues I think is a separate  
7 issue from whether or not there are changed circumstances with  
8 respect to his risk of appearance in this case, which is what  
9 the Bail Reform Act looks at to determine whether or not his  
10 bail conditions should be modified.

11 THE COURT: Mr. Litt was whispering something to you.  
12 No? Just whistling? Mr. Colton.

13 MR. COLTON: Two issues. First, the threshold  
14 question. Ms. McEvoy posits that the defense must demonstrate  
15 to the Court a set of changed circumstances. I don't see that  
16 in 3142. 3142, specifically 3142(c)(3), says, "The judicial  
17 officer may at any time amend the order to impose additional or  
18 different conditions of release." It doesn't impose, as I read  
19 it, unless I am missing something, a burden of proof on either  
20 side. It merely asks the court to make the determination  
21 earlier, in 3142(c), to impose the least restrictive conditions  
22 to assure appearance.

23 THE COURT: Ms. McEvoy?

24 MS. McEVOY: I think defense counsel's argument that  
25 compliance suggests that his bail conditions should be changed  
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1 would apply in almost every case.

2 THE COURT: I am more focused on the first point. I  
3 agree that that in and of itself would not justify a change.  
4 As you point out, that would always be the case. The message  
5 that it would send to people is behave yourself for a couple of

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6 months, then get your bail conditions reduced so you can then  
flee and not pose so much of a cost to those who are putting up  
security for your bond.

My view is that one changed circumstance is that the  
trial has gone on, the trial has been delayed longer than  
people expected. In my view, again, I don't think there is  
anything that contravenes the statute or Mr. Tanaka's  
constitutional rights from that, but I don't know that it is  
improper for the Court to take into account the delay in terms  
of evaluating the bail conditions.

Moreover, as Mr. Tanaka suggests, more than suggests,  
as he argues, at the risk perhaps of alienating those sitting  
next to him at the same table, his bail conditions are more  
stringent than those of his co-defendant. I am not sure why  
that at this point needs to be the case. That is just as a way  
of sending a message to Mr. Hoffman and Ms. Wolfe that I am not  
going to entertain an application from them because I think Mr.  
Vilar's conditions are right in any event.

MS. McEVOY: As your Honor assessed, and certainly the  
magistrate judge also assessed in setting the bail conditions

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early on have not changed. A determination has been made that  
\$8 million is sufficient security and the least security that  
is necessary in order to ensure the defendant's appearance.  
The only thing that has changed since then is that the  
defendant has appeared, which is true, as your Honor noted, in  
a number of cases. I think it is also pretty common for a  
trial date to be adjourned, and that also is not unique.

If the factors are the same in terms of what the  
defendant's risk of appearance is from when your Honor  
initially determined that that was the appropriate amount of  
security, under 3142 the government doesn't see how that really  
constitutes a changed circumstance.

THE COURT: Where are you looking at the changed  
circumstance?

MS. McEVOY: That is the case law interpreting 3142.

THE COURT: So when it says may at any time amend, it  
is only if there is a change in circumstances?

MS. McEVOY: Yes.

THE COURT: What about another change in circumstance  
from the standpoint of Mr. Tanaka might need the money to pay  
for his defense? Why isn't that a change in his circumstance  
at least? That is suggested to me as one of the reasons that  
he would like the money freed up.

MS. McEVOY: It also is suggested to your Honor that  
the defendant would like the money to be freed up so he could

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1 trade.

2 THE COURT: Maybe so he could afford his lawyers. He  
3 is optimistic in his trading ability, I recognize that.

4 MS. McEVOY: There are a number of reasons why the  
5 defendant may want that extra million dollars. But that,  
6 again, is not the assessment. The assessment is whether \$8  
7 million is sufficient security or is required security to  
8 assure the defendant's appearance.

9 THE COURT: Since I didn't set the bail, whose assets  
10 are we talking about here, the 7 million?

11 MR. COLTON: Mr. Tanaka's son Mark, his sister, and  
12 his elderly mother. There is probably no greater group of  
13 moral suasion than that group. He is actually living with his  
14 son Mark right now and sees him on a daily basis.

15 THE COURT: I am going to in part grant the request.  
16 What I am going to do at this stage is reduce the cash amount  
17 to \$500,000. I am going to do so because I think that this  
18 case has gone a little longer than could reasonably have been  
19 anticipated and it has been represented to me that Mr. Tanaka  
20 needs the money to help finance his defense. I think that is a  
21 reasonable request.

22 I am not granting the request in its entirety, because  
23 at this point, as I said, I don't want the trial to get delayed  
24 longer than this fall.

25 In granting this request, though, in part, I want it  
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1 to be crystal clear I don't think that one of the changed  
2 circumstances is any sort of dilatory conduct on behalf of the  
3 government in its production of the discovery in this case or  
4 its handling of the privileged matters.

5 I have said this before, I will say it again: I think  
6 all attorneys on this case who have a well-earned reputation in  
7 this community have been working very hard. That is apparent  
8 to me even though I obviously don't see you all day-to-day. I  
9 am impressed by the quality of the work. I am impressed by the  
10 quantity of the work.

11 I don't think it has been fair to the extent the  
12 government is suggesting a dilatory conduct on behalf of the  
13 defense lawyers, and I don't think it is fair at all from what  
14 I have heard to suggest that the government has been dilatory  
15 at all.

16 It is absolutely true, as Mr. Barofsky says, that when  
17 you are dealing with tens of thousands of pages of documents  
18 and terabytes and gigabytes of computer data, some of which  
19 come from a foreign country that involve encryption, that  
20 involve foreign language, that involve technical difficulties  
21 that arise from the quantity of the materials at issue here,  
22 resource constraints are not bad faith. In any event, I think

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